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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-925

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD,

Petitioners,

v.

JERRY HAMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
MARY J. DEITS
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone: 503/378-4402
Counsel for Petitioners

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In the Supreme Court of the United States

October Term, 1978

No. _____

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD,

Petitioners,

v.

JERRY HAMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon entered in this proceeding on September 12, 1978.

OPINIONS BELOW

The Oregon Court of Apeals affirmed the decision of the Public Employe Relations Board (PERB) that the dismissal of Jerry Hammer from public employment at the Oregon State Penitentiary was proper. The Court of Appeals opinion is reported at 23 Or App 743, 543 P2d 1094 (1975) and is reprinted as Appendix I hereto.

The Oregon Supreme Court reversed and remanded the decision of the Court of Appeals. The Oregon Supreme Court opinion is reprinted at 276 Or 651, 556 P2d 1348 (1976) and is reprinted as Appendix E hereto.

The United States Supreme Court granted a writ of certiorari in this matter, vacated the decision of the Oregon Supreme Court and remanded the case for reconsideration. The Supreme Court's opinion is reported at 434 US 945 (1978) and is reprinted as Appendix D hereto.

The opinion of the Oregon Supreme Court issued pursuant to the remand again reversed and remanded the decision of the Court of Appeals. The Oregon Supreme Court decision is reprinted at 283 Or 369, 583 P2d 1136 (1978) and is attached as Appendix C hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon, the highest state court in Oregon, entered on September 12, 1978, held that the pretermination proceedings followed by the State of Oregon in dismissing a classified state employee violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Jurisdiction is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. A state public employe has a record of chronic

absenteeism, and during the course of several months his employer counsels him about his absenteeism, reprimands him about it and warns that if it continues he could be dismissed. The employe's absenteeism continues. The employer then gives him written notice that he is suspended for 10 days and that at the end of the 10-day period his dismissal is to be effective. The notice also contains the facts upon which his dismissal is based. The decision to dismiss could be withdrawn during the 10-day suspension period. The employe then petitions an independent administrative board to review the employer's decision to dismiss him, and the board finds after a trial-type hearing that the employer had sufficient reason under the law to dismiss him. As a matter of law, has the termination procedure followed by the employer afforded the employe procedural due process under the Fourteenth Amendment?

2. The highest state court finds that the pretermination procedure followed by the employer did not comply with the requirements of procedural due process, but finds no error in the post-termination procedure, whereby an independent administrative review board after a trial-type hearing found that the employer had sufficient reason under the law to dismiss the employe. Under such circumstances, does the Fourteenth Amendment require that the employe

be considered still employed and entitled to an award of back wages?

CONSTITUTIONAL PROVISION INCLUDED

United States Constitution, Fourteenth Amendment:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

1. *General Background*

Prior to the dismissal in question, Mr. Hammer was employed at the Oregon State Penitentiary as a Corrections Officer. He was a classified employee under Oregon's state merit system law. ORS 240.210.

The penitentiary gave Mr. Hammer written notice (Appendix J) of his suspension for ten days and of his dismissal, which was to become effective at the end of the ten-day suspension period. The written notice stated that his dismissal was based upon his "unfitness to render effective service," and the notice set out the facts relied upon by the penitentiary to support its decision.

The written notice was given in accordance with Oregon State Personnel Rule 81-100 which provides:

> "*Notification by Agency* The appointing authority shall notify the employe and the administrator in writing not later than one regular workday after the effective date of any suspension and at least 10 days prior to the effective date of any reduction, demotion, or dismissal. Such notice shall include the grounds for the disciplinary action as provided in ORS 240.555 and the specific charges and facts supporting the statutory charge. With the consent of the administrator, the appointing authority may withdraw, amend, or modify a disciplinary action after written notice has been filed. In instances where the reduction, demotion, or dismissal is amended or modified, the effective date of such disciplinary action must also be rendered or modified to meet the ten days' notice requirement." Personnel Rules and Merit System Law (August 1972).

Mr. Hammer appealed his dismissal to the Public Employe Relations Board[1] (PERB) in accordance with ORS 240.560 which provides:

> (1) A regular employe who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the board not later than 10 days after the effective date of such reduction, dismissal, suspension or demotion. Such appeal shall be in writing and shall be heard by the board within 30 days after its receipt. The board shall furnish the division of the service concerned with a copy of the appeal in advance of the hearing.
>
> (2) The hearing shall be conducted as provided for a contested case in ORS 183.310 to 183.500.
>
> (3) If the board finds that the action complained of was taken by the appointing authority for any political, religious or racial reasons, or because of sex, marital status or age, the employe shall be

[1] The Public Employe Relations Board has been renamed the Employment Relations Board. ORS 240.060.

reinstated to his position and shall not suffer any loss in pay.

(4) In all other cases, if the board finds that the action was not taken in good faith for cause, it shall order the immediate reinstatement and the reemployment of the employe in his position without the loss of pay. The board in lieu of affirming the action, may modify it by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay. The findings and order of the board shall be certified in writing to the appointing authority and shall be forthwith put into effect by the appointing authority.[2]

After a trial-type hearing, PERB upheld Mr. Hammer's dismissal. He then sought judicial review of PERB's decision by the Oregon Court of Appeals. ORS 240.563. The Oregon Court of Appeals affirmed PERB's decision, and both the penitentiary and Mr. Hammer sought review of the Court of Appeals' decision by the Oregon Supreme Court. The Oregon Supreme Court granted review, and reversed and remanded.

This Court granted a writ of certiorari in this case, vacated the decision of the Oregon Supreme Court and

[2]There is some confusion as to the scope of review exercised by PERB in reversing Mr. Hammer's dismissal. As noted in a case decided after Mr. Hammer's hearing before PERB, *Fairview Hospital v. Stanton,* 28 Or App 643, 647, 560 P2d 667 (1977), prior to the *Stanton* decision. Although there were implications that PERB should conduct a de novo type review, making independent findings of fact, there was also language in Oregon cases which impliedly limited PERB's scope of review. *Fairview Hospital v. Stanton, Supra,* clearly established that PERB is ". . . the primary fact finder, that is, the tribunal before which all parties have the opportunity to present and rebut evidence . . ." *Fairview Hospital v. Stanton, supra,* at 649.

remanded the case for reconsideration in light of *Dixon v. Love,* 431 US 105 (1977). The Oregon Supreme Court again reversed and remanded.

2. Facts Material to the Questions Presented

The statement of the facts contained in the Oregon Supreme Court's opinion is an adequate summary of the facts.

". . . The record indicates that Hammer had a record of diabetes and hypertension as well as a sciatic nerve injury which he had received in Vietnam and which had resulted in a 60 per cent disability adjustment from the Veterans Administration. As a result of these problems, as well as a back injury which he suffered on the job, Hammer was frequently absent from work. While there was no evidence of malingering, PERB found that even excluding the absences due to his work related injury, Hammer was absent 143¾ hours in 1973 and 169 hours in 1974 *in addition to* all regular sick leave. PERB also found that employee absenteeism at the penitentiary and that Hammer's attendance record was worse than that of any of the other corrections officers.

"On January 14, 1974, after several previous counseling sessions, Hammer received a written reprimand which outlined his absence record and indicated that unless his record improved he would be subject to further disciplinary actions up to and including discharge. When his absences continued, on April 23, 1974, he was again reprimanded and cautioned that he could be subject to further disciplinary action unless his performance improved. On October 21, 1974 he was again counseled about his use of sick time. After Hammer

missed five more days in October and November, Hammer was notified on December 3, 1974, that he was suspended for 10 days without pay and then discharged effective December 16, 1974.

"At Hammer's request, a post-termination hearing was held on January 22 and 23, 1974, before a hearings examiner from PERB, and on June 6, 1975, the Board issued an order upholding Hammer's dismissal. Hammer then sought judicial review of this order in the Court of Appeals."

3. Manner in Which Federal Question was Raised

The federal question was originally raised by Mr. Hammer by motion before PERB:

"Appellant, Jerry Hammer, moves for an order granting his reinstatement with full back pay for the reason that said appellant's suspension and discharge violated his right to due process of law under the Fourteenth Amendment of the United States Constitution by denying him pre-termination notice of charges, a pre-termination opportunity to appear before the appointing authority, present oral or written arguments, or evidence of affidavits." (PERB Rec, Item 6 at 11).

PERB denied Mr. Hammer's motion:

"Appellant's motion for an order of the Board granting him reinstatement with full back pay, for the reason that said Appellant's suspension and discharge violated his right to due process of law under the Fourteenth Amendment . . . was properly denied . . . ." (PERB Rec, Item 11 at 45).

The question thus raised was preserved in the review of PERB's decision by the Oregon Court of

Appeals. Among the grounds upon which Mr. Hammer sought judicial review was that:

"(3) petitioner was not accorded a pre-termination notice of charges and a pre-termination opportunity to appear before the appointing authority and present oral or written evidence or affidavits in violation of his due process rights under the Fourteenth Amendment of the United States Constitution." (PERB Rec, Item 12 at 51-52).

In his brief to the Oregon Court of Appeals, Mr. Hammer assigned as error:

"III. ORS 240.555, ORS 240.560 AND PERSONNEL DIVISION RULE 81-100 ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION FOR FAILURE TO PROVIDE PROCEDURAL DUE PROCESS." (Petitioner's Br at 8).

In its decision the Oregon Court of Appeals found that the Fourteenth Amendment required a pre-termination trial-type hearing, and therefore found that Mr. Hammer had been dismissed without due process. However, the Oregon Court of Appeals further found that due process was ultimately complied with by the post-termination trial-type hearing before PERB.

Both the penitentiary and Mr. Hammer sought review of the Oregon Court of Appeals' decision. The penitentiary sought review on the basis that:

"The Court of Appeals erred in holding . . . that

> due process requires a pre-termination evidentiary hearing before a member of the state classified service may be discharged. . . ." (Respondent's Pet for Rev at 1).

The Oregon Supreme Court granted review, and reversed the Oregon Court of Appeals' decision. The Oregon Supreme Court held that the pretermination procedure followed by the penitentiary did not comply with the due process requirements of the Fourteenth Amendment of the United States Constitution. Upon remand from this court the Oregon Supreme Court again held that the pretermination procedure did not comply with the Fourteenth Amendment.

The federal question herein presented has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Oregon Supreme Court has decided a federal question of substance not in accordance with the reasoning of this Court.

On remand from this Court for reconsideration in light of *Dixon v. Love,* 431 US 105 (1977), the Oregon Supreme Court again determined that Mr. Hammer's dismissal was in violation of the Fourteenth Amendment to the United States Constitution. The decision of the Oregon Supreme Court is not in accordance with

the principles relating to due process elaborated. *Dixon v. Love, supra.*

The analysis by this Court in *Dixon v. Love, supra,* of the extent to which due process requires an evidentiary hearing prior to the revocation of a driver's license, was based on the factors considered by this Court in *Mathews v. Eldridge,* 424 US 319, 335, 47 SCt 893, 47 LEd 2d 18 (1976):

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The private interest affected by this decision is the right to continued employment. As noted by this Court in *Arnett v. Kennedy,* 416 US 134, 40 L Ed 2d 1542, 94 S Ct 1633 (1974) the injury to an employee who is terminated pending an evidentiary hearing consists of a temporary interruption of his employment. In the present case, in accordance with ORS 240.560, Mr. Hammer was entitled to a full evidentiary hearing before PERB within 30 days after receipt of his appeal to PERB. In the event Mr. Hammer's dismissal was

found improper by PERB he could be reinstated and awarded back pay.

The risk of erroneous deprivation through the procedures used in this case is minimal. The employer in this case needed to determine the amount of absenteeism and whether this absenteeism made the employee "unfit to render effective service".

The nature of the inquiry by the employer is analagous to the nature of the relevant inquiry in the administrative process in *Dixon v. Love, supra; Mathews v. Eldridge, supra;* and *University of Missouri v. Horowitz,* 434 US ——, 98 S Ct 948, 55 L Ed 2d 124 (1978). In all of the above cases the nature of the inquiry related to the documentation of limited facts. This Court found in each of the above cases that the risk of error was minimal and the potential value of an evidentiary hearing was not great.

In the present case the inquiry was limited to the number of days Mr. Hammer was absent from work. The value of a hearing prior to the effective date of his termination was limited. Further, Mr. Hammer was given notice of his termination and the facts supporting the employer's decision to terminate him, ten days prior to the effective date of the termination. During this time he could have notified the penitentiary of

any errors. The Personnel Rules permit an employer to:

> ". . . withdraw, amend or modify a disciplinary action after written notice . . . " Oregon State Personnel Rule 81-100.

Finally, although the Oregon Supreme Court determined there was no "substantial public interest" in Mr. Hammer's termination, the nature of the governmental interest affected by this decision is significant. As noted by this Court in *Arnett v. Kennedy, supra,* in discussing the government's interest in employee terminations:

> ". . . the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." *Arnett v. Kennedy, supra,* at 168.

In the present case, the Government's interest also includes an interest in public safety since the agency operates a maximum security prison.

The issue presented by this case, the necessary procedures to be utilized by public employers in making decisions affecting the rights of its employees, is a question of substantial significance. The clarification of the protections afforded to public employees by the Fourteenth Amendment would promote the efficient operation of all levels of government, insure the consistent application to all public employees of the protections of the Due Process Clause of the Fourteenth Amendment and avoid needless litigation.

B. The Oregon Supreme Court has decided a federal question of substance not heretofore determined by this Court.

The Oregon Supreme Court held that the pretermination procedure followed by the penitentiary was not in accordance with the requirements of the Due Process Clause of the Fourteenth Amendment. The court found that because of the violation of the Fourteenth Amendment, Mr. Hammer was still employed and entitled to back wages until the time he was properly terminated.[3] The Oregon court found no error in the post-termination, trial-type hearing before PERB. Yet, the Oregon court failed to find that the post-termination hearing cured any procedural errors which occurred in the pretermination procedure. Nothing in any of this Court's cases suggests such an expansive interpretation of the Fourteenth Amendment.

[3] By agreement of the parties, Mr. Hammer resigned effective December 15, 1976.

Such an expansion of the Fourteenth Amendment is unwarranted. The reason for procedural due process during the pretermination period is to minimize the risk of error in the employer's decision to terminate the employee, so as to protect the employees interest during the interim period between the decision to terminate and the post-termination hearing. However, once PERB decided after a trial-type hearing that Mr. Hammer's termination was proper, any error in the pretermination was cured.

CONCLUSION

The Oregon Supreme Court's decision conflicts with the reasoning of this Court and incorrectly expands the breadth of the Fourteenth Amendment. Therefore, for the above reasons, a writ of certiorari should issue to review the decision of the Oregon Supreme Court.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
MARY J. DEITS
Assistant Attorney General
Counsel for Petitioners

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APPENDICES

Appendix A

STATE OF OREGON
COURT OF APPEALS

JERRY HAMMER, *Respondent—Cross-Petitioner,*
v.
OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, OREGON STATE DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD, *Petitioners.*
(No. SC 25640, CA 4900)

Supplemental Judgment and Mandate.

Judicial Review from Public Employe Relations Board.

The Conclusions of Law and Ultimate Facts and Order rendered by the Public Employe Relations Board against petitioner in this cause having been affirmed by the Court of Appeals on December 29, 1975, and the Oregon Supreme Court having considered the issues on review and having reversed the decision of the Court of Appeals and remanded to said court with directions to remand below in accordance with the opinion and order of the Supreme Court rendered November 18, 1976.

The cause subsequently having been taken to the Supreme Court of the United States upon petition for writ of certiorari by the Oregon State Penitentiary, and the United States Supreme Court having issued on December 14, 1977, its mandate to the Oregon

Supreme Court remanding the cause for reconsideration in light of *Dixon v. Love,* 431 US 105 (1977).

The cause subsequently having been heard on remand by the Oregon Supreme Court from the United States Supreme Court and having been reargued and resubmitted and reconsidered and the Oregon Supreme Court having issued on October 23, 1978, its mandate to the Oregon Court of Appeals reversing and remanding the cause to said court with directions to order the Public Employe Relations Board to issue an order in conformance with the Supreme Court opinion rendered September 12, 1978, and the original decision of that Court, *Hammer v. Oregon State Penitentiary,* 276 US 651 (1976).

NOW, THEREFORE, IT IS ADJUDGED and ORDERED that the decision entered below is reversed and the cause remanded to the Public Employe Relations Board with directions to issue an order in conformance with the Supreme Court opinion issued September 12, 1978, and with the original decision of that court, *Hammer v. Oregon State Penitentiary,* 276 Or 651 (1976).

ISSUED at Salem, Oregon: Nov. 7, 1978.

Appendix B

STATE OF OREGON
SUPREME COURT

JERRY HAMMER, *Respondent—Cross-Petitioner,*
v.
OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, OREGON STATE DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD, *Petitioners.*
(SC 25640, CA 4900)

Judgment and Mandate.

Judicial Review from Public Employe Relations Board.

The Conclusions of Law and Ultimate Facts and Order rendered by the Public Employe Relations Board against petitioner in this cause having been affirmed by the Court of Appeals on December 29, 1975, and this Court having considered the issues on review and having reversed the decision of the Court of Appeals and remanded to said court with directions to remand the case below in accordance with the opinion and order of the Court rendered November 18, 1976.

The cause subsequently having been taken to the Supreme Court of the United States upon petition for writ of certiorari by the Oregon State Penitentiary, and the United States Supreme Court having issued on December 14, 1977, its mandate to the Oregon

Supreme Court remanding the cause for reconsideration in light of *Dixon v. Love,* 431 US 105 (1977).

NOW THEREFORE this cause having been heard on remand by the Oregon Supreme Court from the United States Supreme Court and having been reargued and resubmitted and reconsidered;

IT IS HEREBY ADJUDGED and ORDEREDD that the decision of the Court of Appeals rendered December 29, 1975, is reversed and the cause remanded to said court with directions to order the Public Employe Relations Board to issue an order in conformance with this opinion rendered September 12, 1978, and the original decision of this Court, *Hammer v. Oregon State Penitentiary,* 276 Or 651 (1976).

ISSUED at Salem, Oregon, this twenty-third day of October 1978.

Appendix C

IN THE SUPREME COURT OF THE STATE OF OREGON

JERRY HAMMER, *Respondent—Cross-Petitioner,*
v.
OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, OREGON STATE DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD, *Petitioners.*
(CA 4900, SC 25640)

On Remand from the United State Supreme Court.*

Reargued and submitted April 3, 1978.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for petitioners. With him on the brief were James A. Redden, Attorney General, and Al J. Laue, Solicitor General, Salem.

Henry H. Drummonds, of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed a brief for respondent/cross-petitioner.

Before Denecke, Chief Justice, and Tongue, Howell, Bryson, Lent and Linde, Justices.

HOWELL, J.

Reversed and remanded.

*434 US 945, 98 S Ct 469, 54 L Ed 2d 306 (1977).

HOWELL, J.

This is an action challenging the constitutionality of procedures employed by the Oregon State Penitentiary in terminating plaintiff Hammer's employment as a corrections officer. In *Hammer v. Oregon State Penitentiary,* 276 Or 651, 556 P2d 1348 (1976) (hereinafter referred to as *Hammer I*), this court held that Hammer's dismissal was in violation of the due process clause of the fourteenth amendment to the United States Constitution because plaintiff was not given a pretermination notice of the charges against him nor an opportunity to rebut the charges. The United States Supreme Court granted the Penitentiary's writ of certiorari, vacated our judgment, and remanded the case to us for reconsideration in light of its recent decision in *Dixon v. Love,* 431 US 105, 97 S Ct 1723, 52 L Ed 2d 172 (1977). *Oregon State Penitentiary v. Hammer,*[1] 434 US 945, 98 S Ct 469, 54 L Ed 306 (1977).

Because a complete statement of the facts can be found in our earlier decision, only a brief recital will be given here. Hammer was hired as a classified employee in January, 1972. During the next two

[1]Mr. Justice Stevens dissented from the summary remand and was joined by Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall. The dissenters argued that whatever the merits of our decision in *Hammer I,* it was not affected by *Dixon v. Love,* 431 US 105, 97 S Ct 1723, 52 L Ed 2d 172. *Oregon State Penitentiary v. Hammer,* 434 US 945, 98 S Ct 469, 54 L Ed 2d 306 (1977).

years, a series of medical problems caused him to be absent frequently from his job. In January, 1974, Hammer received a written reprimand from the Penitentiary and a warning that continued absenteeism could result in disciplinary action up to and including discharge. The absences continued, and in April, 1974, a second reprimand was issued. Finally, on December 3, 1974, Hammer was notified that he was suspended for 10 days without pay, and he was discharged effective December 16, 1974.

Hammer sought and obtained review of his dismissal before a hearings examiner from the Public Employe Relations Board. The Board upheld the dismissal, and Hammer sought judicial review. The Court of Appeals held that the procedures employed by the Penitentiary violated the due process clause of the fourteenth amendment to the United States Constitution. *Hammer v. Oregon State Penitentiary,* 23 Or App 743, 543 P2d 1094 (1975). This court agreed with the Court of Appeals but modified the remedy, holding that Hammer was entitled to an award of back pay and other benefits until he was dismissed properly.[2]

Subsequent to our decision in *Hammer I,* the

[2]Since the *Dixon* case dealt only with the substantive question of whether a hearing was in fact required, and not with the issue of remedies, we see no reason to reconsider the propriety of the remedy we granted in *Hammer I,* i.e., that Hammer is entitled to back pay up until the time he was properly terminated. By agreement of the parties, Hammer resigned effective December 15, 1976.

United States Supreme Court decided *Dixon v. Love,* supra. *Dixon* involved an Illinois statute that authorized the Secretary of State to suspend or revoke a driver's license without preliminary hearing upon a showing that the driver had been repeatedly convicted of traffic offenses. Pursuant to this statute, the Secretary promulgated a rule that provided for automatic revocation if a driver's license was suspended three times within a 10-year period. Plaintiff's license was revoked under this regulation.

Plaintiff challenged the constitutionality of the Illinois statute in federal court, alleging that due process required a pre-revocation hearing to determine whether he fell within the statutory criteria. A three-judge district court upheld plaintiff's claim, but the United States Supreme Court reversed, holding that in light of the competing interests involved due process did not require a hearing prior to the license revocation.

We have reconsidered our decision in *Hammer I* in light of the *Dixon* case and conclude that the administrative action in *Dixon* differs significantly from the action that occurred in *Hammer I.* Our conclusion is based on an application of the three-pronged analysis used by the Court in *Mathews v. Eldridge,* 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976):

"* * * [I]dentification of the specific dictates of

> due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. * * *." *Id.* at 335, 96 S Ct at 903, 47 L Ed 2d at 33.

In *Dixon* the private interest was "the granted license to operate a motor vehicle." 431 US at 113, 97 S Ct at 1728, 52 L Ed 2d at 180. The Court found this interest to be important but not as important, for example, as welfare payments "on which the recipient may depend for his very subsistence." *Id.* Analogizing to the present case, it is not unreasonable to assume that the plaintiff was dependent upon his continued employment "for his very subsistence," and to conclude that his employment interest should be given some procedural safeguards. On a continuum, placing a driver's license and other "privileges" at one end and welfare payments and other "necessities" at the other end, employment seems to us to be closer to the "necessity" end of the continuum.[3] *See Arnett v.*

[3]It is worth noting that in *Dixon* the Court was impressed by the fact that special provisions were made under Illinois law for holders of commercial licenses. In effect, license revocations that might affect one's livelihood were treated differently than ordinary revocations.

(Continued on following page)

Kennedy, 416 US 134, 94 S Ct 1633, 1670, 40 L Ed 2d 15, 67 (1974) (Marshall, J., dissenting).

The second factor listed in *Mathews,* the risk of error arising out of the procedures used, provides an even stronger basis on which to distinguish the present case from *Dixon.* As noted above, the license revocation in *Dixon* was automatic once three suspensions had occurred. Consequently, "* * * requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations." 431 US at 114, 97 S Ct at 1728, 52 L Ed 2d at 181. On the contrary, the decision in the present case was not automatic. Instead, it was necessary to consider a variety of factors, including the reasons for Hammer's absenteeism, the Penitentiary's ability to accommodate his absences, and the possibility that the absenteeism might be eliminated in the future. Particularly with respect to the third factor, we believe that Hammer should have been afforded an informal opportunity to respond to the charges prior to his dismissal. The counseling and reprimands that

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This discussion of the relative weight of private interest has overtones of the old "right-privilege" distinction that the United States Supreme Court purportedly now has discarded. *Board of Regents v. Roth,* 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972). An analysis of that Court's recent decisions, however, indicates that the distinction may still be relevant "albeit in somewhat different verbal garb." *Arnett v. Kennedy,* 416 US 134, 211, 94 S Ct 1633, 1672, 40 L Ed 2d 15, 66 (1974) (Marshall, J., dissenting). *See Dixon v. Love,* supra n. 1.

occurred during the previous 12 months were insufficient to satisfy the requirements of due process.

Finally, there was no "substantial public interest" in the summary termination of Hammer's employment comparable to the public interest in highway safety that compelled the summary license revocation in *Dixon.* Hammer's performance as a corrections officer was not under attack, only his absenteeism. To allow him an informal opportunity to respond to the charges against him prior to his termination would have posed no substantial threat to prison security.

For these reasons, we must agree with the plaintiff that a careful analysis of the factors present in *Dixon* actually supports our holding in *Hammer I,* rather than contradicts it. Had Hammer's superiors established a specific limit on absenteeism, beyond which additional absences would lead to automatic dismissal, this case would be must closer to *Dixon.*

We emphasize again that we do not hold that due process requires an evidentiary hearing prior to employment termination in cases such as this. We merely hold that Hammer was entitled to notice of the charges against him, the kind of sanctions being considered, and an opportunity to respond to the charges prior to his dismissal. In our view, such a

requirement will impose a minimal burden on the state.[4].

As previously ordered, the Court of Appeals is directed to order the Public Employe Relations Board to issue an order in conformance with this opinion and the original decision of this court, *Hammer v. Oregon State Penitentiary,* supra 276 Or 651.

Plaintiff's request for attorney fees is denied for lack of statutory authority.

Reversed and remanded.

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[4]In its brief on remand, the defendant also argues that a reversal of *Hammer I* is required by *Board of Curators of the University of Missouri v. Horowitz,* 434 US ——, 98 S Ct 948, 55 L Ed 2d 124 (1978). In that case, the Court held that academic evaluations and dismissals based upon such evaluations are not subject to the same due process requirements as those controlling disciplinary proceedings. From this, defendant argues that decisions concerning "competency" in employment are governed by a different standard than decisions concerning "misconduct." Even if we assume that the Penitentiary's evaluation of Hammer's work is analogous to the University of Missouri's evaluation of Horowitz's academic performance, the fact remains that Hammer was afforded even less procedural protection in his case than was Horowitz. Horowitz was given an opportunity to "appeal" the University's decision not to let her graduate by performing clinical work before a group of practicing physicians. 434 US ——, 98 S Ct at 950, 55 L Ed 2d at 129. Conversely, Hammer was given no opportunity to present his case prior to the time the termination decision was made. As we have already noted, we do not consider the counseling and reprimands that Hammer received during the months preceding his termination to be adequate satisfaction of the due process requirements of notice and opportunity to be heard.

Appendix D

SUPREME COURT OF THE UNITED STATES

OREGON STATE PENITENTIARY, ET AL. *v.* JERRY HAMMER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

No. 76-1377. Decided November 14, 1977

The petition for a writ of certiorari is granted; the judgment of the Supreme Court of the State of Oregon is vacated, and the case is remanded to that court for reconsideration in the light of *Dixon v. Love,* 431 U.S. 105 (1977).

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Since *Dixon v. Love,* 431 U. S. 105, sheds no light on the issues decided by the Oregon Supreme Court, the Court's disposition of this petition can only be characterized as cavalier.

The respondent, a tenured corrections officer, was discharged without a pretermination hearing; at a post-termination hearing the Public Employee Relations Board decided that the dismissal was proper as a matter of state law. On appeal, the Oregon Supreme Court reversed. Relying on its decision in *Tupper v. Fairview Hospital and Training Center,* 276 Ore. 657, 556 P. 2d 1340 (1976), the court concluded that

procedural due process required that a tenured employee receive notice of the charges against him and the proposed sanction, as well as an opportunity to respond, before being discharged. It further held that respondent was entitled to backpay and other benefits from the time of his discharge until such time as a proper termination hearing is held, even though the discharge had been upheld at the post-termination hearing.[1].

No decision of this Court is controlling on either the due process issue or the remedy issue decided by the Oregon Supreme Court. In *Dixon v. Love, supra,* this Court held that the Illinois regulation providing for the automatic suspension of the license of a driver who had been convicted repeatedly for traffic offenses was constitutionally valid. In so holding, the Court relied on the fact that the driver "had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based," 430 U. S. 105, 113, on the fact that the suspension and revocation decisions were "largely automatic" under the Illinois regulations, *id.,* at 113, and on "the important public interest in safety on the roads and highways, and in the prompt removal of a

[1]The Oregon Court of Appeals had held that respondent was entitled to a pretermination hearing, but it limited the award of back wages to the period between the date of his dismissal and the date of his subsequent hearing. 23 Ore. App. 743, 543 P.2d 1094 (1075).

safety hazard." *Id.,* at 114. None of those factors, decisive in *Dixon,* has any relevance to the issues decided by the Oregon Supreme Court in this case.

Indeed, in *Dixon* the premise for the Court's legal analysis was " 'that something less than an evidentiary hearing is sufficient prior to adverse administrative action,.' " *Id.,* at 113, quoting *Mathews v. Eldridge,* 424 U. S. 319, 343. Precisely the same premise provided the basis for the legal analysis of the Oregon Supreme Court. The court held that a pretermination evidentiary hearing was not required, but that "something less" was necessary—in this case, fair notice and an opportunity to respond. Whether or not that holding is correct, it is not even arguably inconsistent with either the holding or anything said by this Court in *Dixon.* Nor is there anything in *Dixon* which remotely relates to the question whether the remedy directed by the Oregon Supreme Court was proper.

In my judgment, even assuming that the Oregon Supreme Court has extended greater procedural protection to Oregon residents than the Federal Constitution requires, there is no need for this Court to address those issues until a conflict with the Oregon holding has developed on a national level. But if my judgment in this respect is incorrect, and enlightenment on a nationwide basis is indeed appropriate, surely the Court should provide something more edifying than a

cryptic reference to a case as wide of the mark as *Dixon v. Love.* This summary treatment of a carefully reasoned decision of the highest court of the State of Oregon fails to accord proper respect to that tribunal and gives no guidance whatsoever for further proceedings in this litigation. Cf. *United States v. Jacobs,* 429 U. S. 909-910 (STEVENS, J., concurring).[2]

I respectfully dissent.

[2] Although four of us disagree with the Court's disposition of this case, the Justices who join this opinion do not insist that the case be orally argued. See *Trinkler v. Alabama,* 418 U. S. 917, 918.

Appendix E

No. 247—November 18, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

HAMMER, *Respondent—Cross-Petitioner,*
v.
OREGON STATE PENITENTIARY et al, *Petitioners.*

On review from the Court of Appeals.*

Argued and submitted June 7, 1976.

W. Michael Gillette, Solicitor General, Salem, argued the cause for petitioners. Also on the briefs were Lee Johnson, Attorney General, and John W. Burgess and Al J. Laue, Assistant Attorneys General, Salem.

Henry H. Drummonds of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed briefs for respondent/cross-petitioner.

Reversed and remanded.

HOWELL, J.

*Review of order of Public Employe Relations Board. 23 Or App 743, 543 P2d 1094 (1975).

HOWELL, J.

This is a review of a decision of the Court of Appeals, 75 Adv Sh 4513, 23 Or App 743, 543 P2d 1094 (1975), which upheld the Public Employe Relations Board's (PERB) decision affirming Hammer's dismissal from public employment at the Oregon State Penitentiary. As in the companion case, *Tupper v. Fairview Hospital and Training Center,* decided today, 276 Or 657, —— P2d —— (1976), the primary issue in this case involves the constitutional adequacy of the pretermination procedures followed by the state in dismissing a classified employee. The Court of Appeals held that the procedures employed violated the due process clause of the fourteenth amendment to the United States Constitution and concluded that Hammer was therefore entitled to an award of back wages for the period subsequent to his dismissal, but prior to the PERB hearing. Both the State Penitentiary and Hammer have petitioned this court for a review of that decision.

Prior to the dismissal in question, Hammer was employed by the Oregon State Penitentiary as a corrections officer. Hammer was hired in January 1972 as a classified employee. The record indicates that Hammer had a record of diabetes and hypertension as well as a sciatic nerve injury which he had received in Vietnam and which had resulted in a 60 per cent disability adjustment from the Veterans Administration. As a result of these problems, as well as a back injury which he suffered on the job, Hammer was frequently absent from work. While there was no evidence of malingering, PERB found that even excluding the absences due to his work related injury, Hammer was absent 143¾ hours in 1973 and 169 hours in 1974 *in addition to* all regular sick leave. PERB also found that employee absenteeism created serious staffing and scheduling problems at the penitentiary and that Hammer's attendance record was worse than that of any of the other corrections officers.

On January 14, 1974, after several previous counseling sessions, Hammer received a written reprimand which outlined his absence record and indicated that unless his record improved he would be subject to further disciplinary actions up to and including discharge. When his absences continued, on April 23, 1974, he was again reprimanded and cautioned that he could be subject to further disciplinary action unless his performance improved. On October 21, 1974 he was again counseled about his use of sick time. After Hammer missed five more days in October and November, Hammer was notified on December 3, 1974, that he was suspended for 10 days without pay and then discharged effective December 16, 1974.

At Hammer's request, a post-termination hearing was held on January 22 and 23, 1974, before a hearings examiner from PERB, and on June 6, 1975, the Board issued an order upholding Hammer's dismissal. Hammer then sought judicial review of this order in the Court of Appeals.

The State Penitentiary contends that the Court of Appeals erred in holding that procedural due process requires a pretermination evidentiary hearing prior to the dismissal of a classified employee. The state argues that a post-termination hearing is sufficient so long as the employee receives notice that certain conduct could subject him to discharge, and he is given some informal opportunity to respond.

This issue is controlled by *Tupper v. Fairview Hospital, supra,* which holds that prior to his dismissal, a classified state employee must be notified of the charges against him as well as the proposed sanction, and he must also be given an opportunity to respond. *See also Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974).

The record indicates that Hammer was repeatedly counseled over a period of several months about excessive absences and the possible consequences.

However, there is no evidence that Hammer was notified prior to his termination that he was being charged with a continuation of these excessive absences, and that, as a result, the state was considering dismissal. Nor is there any evidence that Hammer was ever provided with an opportunity to rebut these charges and contest the proposed sanction prior to his termination. Therefore, we conclude that the procedures employed by the state in dismissing Hammer were constitutionally inadequate and that his termination on December 16, 1974, was invalid. Consequently, as in *Tupper,* we hold that Hammer is entitled to an award of back wages and other benefits, and that he should continue to receive these amounts until he is properly terminated.[1] In determining these amounts, the Board should offset any compensation and other benefits Hammer has received since his original termination.

The Court of Appeals is directed to order the Public Employe Relations Board to issue an order in conformance with this opinion.

Reversed and remanded.

O'CONNELL, J., specially concurring.

I specially concur for the reasons stated in my separate opinion in *Tupper v. Fairview Hospital,* decided this day.

[1]There is one remaining legal issue in this case which was not before us in *Tupper.* Hammer contends that even a prolonged history of chronic absenteeism because of medical problems would be insufficient to establish the statutory "unfitness to render effective service," ORS 240.555, unless medical evidence of a continuing disability is also presented. We disagree. If, on remand, Hammer is again terminated, we believe that a finding of continued, persistent and unpredictable absenteeism over a period of several years would be sufficient to support a conclusion that the employee was not fit to render effective service.

Appendix F

OREGON SUPREME COURT

January 11, 1977

TUPPER V. FAIRVIEW HOSPITAL

CA 4449

HAMMER V. OREGON STATE PENITENTIARY

CA 4900

John W. Burgess
Assistant Attorney General

The Supreme Court has today denied respondents' Petitions for Rehearing in the above-entitled cases.

cc—Henry H. Drummonds
Kulongoski, Heid, Durham & Drummonds

STATE COURT
ADMINISTRATOR

By /s/ Marilyn Hartley
Calendar Clerk

Appendix G

STATE OF OREGON

COURT OF APPEALS

JERRY HAMMER,	)	
	)	
Petitioner,	)	JUDGMENT
	)	AND
v.	)	MANDATE
	)	
OREGON STATE PENITENTIARY, Corrections Division; Oregon State Department of Human Resources; PUBLIC EMPLOYE RELATIONS BOARD,	)	JUDICIAL REVIEW
	)	
	)	CA 4900
Respondents.	)	

This cause having come on to be heard on appeal and the court having found there was not error as alleged, and subsequently the cause having gone to the Supreme Court on petition for review and said court on November 18, 1976, having reversed this court and entered its mandate as attached:

NOW, THEREFORE, IT IS ADJUDGED and ORDERED that the decision entered below is reversed.

IT IS FURTHER ORDERED that petitioner recover from respondents costs and disbursements in the amount of $40 in the Supreme Court.

The cause is remanded for further proceedings

pursuant to law and the decision and opinion of the Supreme Court.

ENTERED at Salem, Oregon NOVEMBER 18, 1976.

ISSUED: JAN. 19, 1977

Appendix H

No. 248—November 18, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

TUPPER, *Respondent—Cross-Petitioner,*
v.
FAIRVIEW HOSPITAL AND TRAINING CENTER et al, *Petitioners.*

On review from the Court of Appeals.*

Argued and submitted June 7, 1976.

W. Michael Gillette, Solicitor General, Salem, argued the cause for petitioners. Also on the briefs were Lee Johnson, Attorney General, Salem, and John W. Burgess, Assistant Attorney General, Salem.

Henry H. Drummonds of Kulongoski, Heid, Durham & Drummonds, Eugene, argued the cause and filed briefs for respondent/cross-petitioner.

Reversed and remanded.

HOWELL, J.

*Review of order of Public Employe Relations Board. 22 Or App 523, 540 P2d 401 (1975).

HOWELL, J.

This case is before us on review from a decision of the Court of Appeals, 75 Adv Sh 3218, 22 Or App 523, 540 P2d 401 (1975) which upheld the action of the Public Employe Relations Board (PERB) in affirming Tupper's dismissal from public employment by Fairview Hospital and Training Center. The Court of Appeals held that the hospital's pretermination proceedings were constitutionally inadequate, but affirmed Tupper's dismissal on the basis of the post-termination hearing conducted by PERB. The Court of Appeals also held that Tupper was entitled to an award of "lost wages and other benefits" for the time between his dismissal and the post-termination hearing, but refused to grant that relief in this proceeding on the grounds that PERB lacked the legislative authority to make such an award. Both Tupper and Fairview Hospital petitioned this court for review of that decision. We granted these petitions, as well as those in the companion case, *Hammer v. Oregon State Penitentiary,* 75 Adv Sh 4513, 23 Or App 743, 543 P2d 1094 (1975), in order to consider what types of pretermination and post-termination procedures are constitutionally required when a public agency seeks to dismiss a classified employee.

Prior to his dismissal, Tupper had been employed for approximately six years at Fairview Hospital, a state institution for the mentally deficient which is operated by the Mental Health Division of the Department of Human Resources. As a psychiatric aide, Tupper's duties included the supervision and training of the "residents" living in one of several small, dormitory-like "cottages." His responsibilities included preparing and maintaining a "program book" in which the progress made by his residents in various training programs was recorded. The record indicates that these program records were essential to the successful operation and continued funding of these programs.

On April 22, 1974, Tupper's supervisor discovered that Tupper had lost his program book. Tupper agreed to reassemble these records by May 1. When Tupper failed to complete the work by this deadline, he was given until the 24th of May to finish. However, no further progress was made by that date. After four more weeks of remonstrating, Tupper's supervisor sent him a written warning informing him that if the work was not completed by July 10, "this will be considered insubordination and disciplinary action will follow."

When July 10 arrived, Tupper had made additional progress, but some of the records still remained incomplete. On July 15, Tupper was suspended for the day and presented with another memo advising him that "further disciplinary measures" would be taken unless the records were completed by the following day. On July 17, more progress had been made, but the work remained unfinished. Tupper was again suspended for the day and ordered to complete the job by the 18th. However, Tupper's program book remained unchanged on the 18th.

On July 23, 1974, after reviewing Tupper's situation with his supervisors, the director of the psychiatric aide staff recommended a dismissal. The following day, without first notifying Tupper of the contemplated dismissal and affording him an opportunity to be heard, the superintendent of Fairview suspended Tupper without pay and dismissed him effective August 2, 1974. A letter was then sent to Tupper informing him of this action and detailing the facts relied upon in support of the dismissal.

After his dismissal, Tupper sought a hearing before PERB. The hearing was conducted on December 5, 1974, before a hearings examiner. On January 14, 1975, the hearings examiner issued his "Proposed Findings of Fact, Conclusion of Law, and Order," which recommended affirming Tupper's dismissal. Tupper then filed his objections to the proposed order,

and, on March 21, 1975, the board issued a final order which essentially adopted the proposals of the hearings examiner and upheld the dismissal.

Tupper then sought judicial review of this order in the Court of Appeals. While the Court of Appeals concluded that the hospital violated Tupper's rights to procedural due process by failing to notify him of his proposed dismissal and offering him an opportunity to be heard, the court also determined that the subsequent PERB hearing supplied the due process previously lacking and held that Tupper was only entitled to an award of back wages for the period between the date of his dismissal and the date of the hearing.

In its petition for review of that decision, Fairview contends that a pretermination hearing is not constitutionally required in every case and that the post-termination hearing conducted by PERB, together with the repeated encouragements, conferences, demands, warnings, etc., was sufficient to satisfy due process requirements in the present situation. Tupper's petition essentially takes the position that the Court of Appeals was correct in deciding that the hospital violated his due process rights by dismissing him without notice and without an opportunity to be heard, but he contends that the subsequent PERB hearing was not sufficient to remedy this violation. He argues that the PERB hearing is not a de novo proceeding and that a review hearing which accords weight to a procedurally defective initial decision merely perpetuates the original denial of due process. Tupper also argues that even if the Court of Appeals correctly decided that the post-termination hearing was constitutionally adequate, he is then entitled to an award of back pay not merely from August 2, 1974 to December 5, 1974, the date of the hearing, but to March 21, 1975, the date of the board's final decision. Because of our disposition of this case, we will discuss only the first two of these issues.

The fourteenth amendment to the United States

Constitution imposes procedural due process constraints on governmental actions which deprive individuals of significant liberty or property interests. Fairview does not dispute the fact that Tupper had a constitutionally significant "property interest" in his continued employment, and we find that he clearly did. *See* ORS 240.560; *Papadopoulos v. Bd. of Higher Ed.*, 14 Or App 130, 511 P2d 854, S Ct *rev. denied* (1973), *cert. denied* 417 US 919 (1974). *See also Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974); *Perry v. Sindermann,* 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *Board of Regents v. Roth,* 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972). *Compare Bishop v. Wood,* —— US ——, 96 S Ct 2074, 48 L Ed2d 684 (1976).

Governmental deprivation of such a property interest must be accompanied by at least minimal procedural protections including some form of notice of the contemplated action and some sort of opportunity to be heard if that action is contested. *Arnett v. Kennedy, supra. See also Mathews v. Eldridge,* —— US ——, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Wolff v. McDonnell,* 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974). The particular form of the notice and hearing required, however, will vary from case to case depending upon the particular circumstances and interests involved. *Mathews v. Eldridge, supra; Morrissey v. Brewer,* 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484 (1972); *Cafeteria & Restaurant Workers Local 473 v. McElroy,* 367 US 886, 81 S Ct 1743, 6 L Ed 2d 1230 (1961).

In this case, the dispute centers upon what process is due prior to the initial dismissal and pending subsequent review. The determination of this issue requires an analysis of several factors. As most recently stated by the United States Supreme Court:

> "* * * identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* supra 96 S Ct at 903.

See also Friendly, *Some Kind of Hearing,* 123 U Pa L Rev 1267, 1278 (1975).

The factors which must be weighed in this case are similar to those considered by the United States Supreme Court in *Arnett v. Kennedy, supra.* In *Arnett* the court sustained the validity of the federal pretermination procedures for dismissing an employee for cause. These procedures included notice of the action contemplated, a copy of the charge, reasonable time for filing a written response and supporting affidavits, and an opportunity for an oral appearance upon request. Then, following the dismissal, a full evidentiary hearing was provided. In upholding this procedural scheme, Justice Powell balanced the interest of the individual employee in continued public employment pending an evidentiary hearing against the government's interest in the expeditious removal of an unsatisfactory employee.[1] Powell noted that the procedures in *Arnett* "minimize[d] the risk of error in the initial removal decision and provide[d] for compensation for the affected employee should that decision eventually prove wrongful." 416 US at 170. He then concluded that a full evidentiary hearing need not be provided prior to the employee's dismissal and that the

[1] Several separate opinions were filed in *Arnett,* none of which commanded the support of a majority of the court at the time. However, both the United States Supreme Court and the lower federal courts have since been following the reasoning of the opinion written by Justice Powell in that case, and we have determined to do so as well. *See, e.g., Mathews v. Eldridge,* —— US ——, 96 S Ct 893, 47 L Ed 2d 18 (1976); *Boehning v. Indiana State Emp. Ass'n, Inc.,* 423 US 6, 96 S Ct. 168, 46 L Ed 2d 148 (1975); *Goss v. Lopez,* 419 US 565, 95 S Ct 729, 42 L Ed 2d 725 (1975); *Frost v. Weinberger,* 515 F2d 57 (2d Cir 1975); *Rolles v. Civil Ser. Comm.,* 512 F2d 1319 (DC Cir 1975); *Eley v. Morris,* 390 F Supp 913 (ND Ga 1975); *Young v. Hutchins,* 383 F Supp 1167 (MD Fla 1974).

procedures employed in *Arnett* provided "a reasonable accommodation of the competing interests." *Id.* at 171.[2]

The corresponding interests of the employee and the government in this case are similar to those in *Arnett.* The scope of the post-termination hearings is also similar. However, in contrast to the rather extensive pretermination procedures existing in *Arnett,* under the termination system utilized in this case virtually no procedural safeguards are employed prior to the actual dismissal. Although Tupper was repeatedly counseled and warned that "further disciplinary measures" might be taken, he apparently was never notified that termination was being considered and was never given an opportunity to defend himself before the officials who decided that he should be dismissed. Due to the absence of these important procedural safeguards, the risk of an erroneous deprivation of the employee's interest in continued employment pending a full evidentiary hearing was substantially greater in this case than it was in *Arnett.*

Moreover, even the relatively extensive pretermination procedures involved in the *Arnett* decision were found to be constitutionally adequate by only a fairly

[2]The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett,* does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the "due course of law" provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pretermination hearing in such cases. This issue was never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state "due course of law" constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. *Compare State v. Childs,* 252 Or 91, 99, 447 P2d 304 (1968) *with Deras v. Meyers,* 272 Or 47, 64 n.17, 535 P2d 541 (1975). *See also Olsen v. State of Oregon,* 276 Or 9, 554 P2d 139 (1976); *Plummer v. Donald M. Drake Co.,* 212 Or 430, 320 P2d 245 (1958).

narrow margin.[3] Therefore, on the basis of *Arnett v. Kennedy, supra,* and in view of the competing interests involved in these cases, we conclude that in addition to his full post-termination hearing Tupper was intitled to the following procedural safeguards prior to his dismissal. First, he should have been notified of the charges against him. Second, he should have been informed of the kinds of sanctions being considered. Third, he should have been given at least an informal opportunity to refute the charges either orally or in writing before someone who was authorized either to make the final decision or to recommend what final decision should be made.[4]

Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974, was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

Reversed and remanded to the Court of Appeals

[3]Four of the nine Justices dissented, at least in part. Marshall, Douglas and Brennan dissented on the grounds that a full evidentiary hearing was required prior to the dismissal. White concurred in part and dissented in part on the grounds that the pretermination procedures involved in that case were adequate only if an impartial hearings officer made the termination decision.

[4]In the interest of avoiding unnecessary controversy, we feel that whenever possible the employee should receive written notice of the charges, of the proposed sanction, and of his right to an informal hearing.

[5]The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 183.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds "[t]he statute, rule or order to be unconstitutional." ORS 183.482(8)(b).

with directions to order the Public Employe Relations Board to issue an order awarding back wages and other benefits until such time as a valid termination has occurred.

O'CONNELL, J., specially concurring.

The pivotal question raised by the state's petition for review and Tupper's cross-petition for review is the validity of the procedures for termination under ORS 240.555, 240.560 and Personnel Rule 81-100, tested by the constitutional requirements of due process. More specifically, the question is whether a pre-termination hearing is required to satisfy due process requirements.[1] Both this case and the companion case, *Hammer v. Oregon State Penitientiary,* decided this day, were briefed and argued solely with reference to the due process clause of the Fourteenth Amendment. Within the framework it seems probable from *Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974), that a post-termination hearing is sufficient to satisfy the federal requirement of due process, at least if certain safeguards such as notice of the charges and an opportunity to respond precede the dismissal. Neither the petitioner nor respondent have sought to determine whether the Oregon Constitution goes beyond this interpretation of the federal constitution, guaranteeing a greater protection in a procedural way to an employee with entitlement. It is important that this inquiry be made because if there is an applicable provision in our constitution which can be construed as requiring a pre-termination hearing, any discussion of the Fourteenth Amendment and its interpretation in the *Arnett* case is, of course irrelevant.[2]

Since the applicability of the Oregon Constitution

[1] Although the constitutional question might have been avoided by interpreting ORS 240.555 and 240.560 as requiring a pre-termination hearing, Personnel Rule 81-100, adopted pursuant to the authority vested in the Public Employe Relations Board under ORS 240.555(1) to establish termination procedures, provides for a post-termination hearing.

[2] *See,* Linde, *Without "Due Process,"* 49 Or L Rev 125, 133 (1970).

was not raised by counsel, the preliminary question is whether this court can raise it sua sponte. This is not the situation, frequently presented, where a constitutional question is not raised at the trial stage and is raised for the first time by counsel on appeal. In the present case it is assumed that a constitutional question of procedural due process under the federal constitution is properly presented; the question is whether this court should, on its own motion, consider the related question of the applicability of Art. I, § 10 of the Oregon Constitution. Since the matter is of substantial public concern, it is our duty to consider it.[3]

Art. I, § 10 provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

It has been strongly argued by Professor Hans Linde that the guarantees in Art. I, § 10 are not the precise equivalents of the guarantees found in the Fourteenth Amendment.[4] Assuming, without deciding, that this is

[3] Inasmuch as the right to a pre-termination hearing is the principal question involved and since this question of the timing of the hearing would involve a similar policy analysis under both the federal and state constitutions (assuming the latter is applicable), there would be no reason to call for supplemental briefs.

[4] Linde, *Without "Due Process,"* 49 Or L Rev 125 (1970). Professor Linde interprets Art. I, § 10 as a "remedies clause" merely guaranteeing a legal remedy for private wrongs derived from Chapter 40 of the Magna Carta ("To no one will we sell, to no one will we deny, or delay right or justice"), and is not a "due process" clause providing guarantees against official deprivations "except by the law of the land"—clauses derived from Chapter 39 of the Magna Carta ("NO free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land"). When the Magna Carta was re-issued under Henry III, the two clauses were combined under Chapter 29, which eventually was enacted as a statute by Parliament in 1797. Art. I, § 10 and its predecessors say more than Chapter 40 does, and it is possible that the constitutional draftsmen intended to embody the two ideas expressed in Chapter 29 of Magna Carta. In any event, in the states which have provisions similar to Art. I, § 10 the courts, including this court, have

(Continued on following page)

so, it seems clear that the two constitutional provisions are the same insofar as each would prohibit the deprivation of the interests specified in the respective provisions of the federal and Oregon constitutions without fair procedures generally associated with the term "due process."

In the present case the interest of Tupper is denominated an "entitlement." Comparable interests of public employees have been classified as "property" interests.[5] The inquiry is, therefore, whether the guarantee of Art. I, § 10, of the Oregon Constitution, which prohibits injury to person, property or reputation without due course of law, and guarantees the complete administration of justice, is satisfied by anything short of a pre-termination hearing. In addi-

(Continued from previous page)

regarded the provisions as the equivalent of the due process clause of the Fourteenth Amendment. *See,* (interpreting Indiana Constitution, Art. I, § 12) *Hale v. State,* 248 Ind 630, 230 NE2d 432, 435 (1967); *Sweet v. State,* 233 Ind 160, 117 NE2d 745, 746-47 (1954); *Hamm v. Review Board of the Indiana Employment Security Div.,* 132 Ind App 318, 177 NE2d 337, 338 (1961); *Freeman v. Pierce,* 179 Ind 445, 101 NE 478, 479 (1913), and (interpreting Ohio Constitution, Art. I, § 16) *Ex Parte Martin,* 139 Ohio St 609, 41 NE2d 702, 706 (1942); *State ex rel Smilack v. Bushong,* 159 Ohio St 259, 111 NE2d 918, 922 (1953), and (Oregon) *State v. Bouse,* 199 Or 676, 686, 264 P2d 800 (1953). *Cf., School Dist. No. 7 v. Weissenfluh,* 236 Or 165, 173, 387 P2d 567 (1963) and *Columbus Packing Co. v. State,* 106 Ohio St 469, 140 NE 376, 378 (1922).

Even if Art. I, § 10 is interpreted as not including a substantive due process provision, it does require procedural due process in the sense of requiring a remedy for injuries to person, property or reputation. If an entitlement is "property", the employee is entitled to a "remedy by due course of law" to retain it. That remedy must be provided by the state. It is for us to say whether it is a remedy "by due course of law" if the employee is given a hearing only after he has been discharged.

[5] *See, e.g., Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed2d 15 (1974) (the separate opinions reveal a consensus that such an "entitlement" is a property interest); *Perry v. Sindermann,* 408 US 593, 92 S Ct 2694, 33 L Ed2d 570 (1972); *Comment,* 10 Harv Civil Rights L Rev 472, 473 (1975). *Cf.,* Reich, *The New Property,* 73 Yale L J 733 (1964).

The recent cases of *Mitchell v. W. T. Grant Co.,* 416 US 600, 94 S Ct 1895, 40 L Ed2d 406 (1974) and *North Georgia Finishing v. Di-Chem.,* 419 US 601, 95 S Ct 719, 42 L Ed2d 751 (1975) have created uncertainty in this area. *See* opinions of Stewart, J. in *Mitchell* and *North Georgia Finishing.* Regardless of the direction finally taken by the U. S. Supreme Court, I believe that plaintiff in the present case has a property interest protected by the justice and remedies clause of the Oregon Constitution.

tion to being a "property" interest, job tenure is also a "reputation" interest. The stigma which an employee suffers upon being discharged from his job, even if only temporarily, can be regarded as an injury to his "reputation," thus qualifying as a protected interest under Art. I, § 10.[6]

Beginning, then, with the recognition of a constitutionally protected interest in the petitioner, the court is faced with the question posed above—is a pre-termination hearing necessary to meet the minimum standards of due process? In answering this question, it must be recognized that the procedural requisites for a due process hearing vary depending upon the importance of the interests involved. On one hand are the interests of the government in expeditiously removing an unsatisfactory employee; on the other hand are the interests of the employee in retaining his job. In the *Arnett* case Justice Powell, in a specially concurring opinion, concluded that the interest of the government as employer outweighed the interest of the employee in balancing the need for a pre-termination hearing. He stated:

> "* * * Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

He added that

> "* * * [A] requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges." 40 L Ed2d at 41.

[6] Discharge from a government job often seriously injures the employee's business and professional reputation. There is a widely held impression that it is difficult to fire government workers, and this contributes to the belief that anyone fired by the government is probably unemployable. *See,* Merrill, *Procedures for Adverse Actions Against Federal Employees,* 59 Va L Rev 196, 204 (1973); and *Due Process and Public Employment in Perspective: Arbitrary Dismissals of non-Civil Service Employees,* 19 UCLA L Rev 1052, 1065 (1972). Discharge from a job often damages the employee's personal reputation, too, since status in our society is so closely related to an individual's source of livelihood. *See,* Reich, *The New Property, supra* note 5.

It is difficult to understand how Mr. Justice Powell could have recited the foregoing as the reasons for his conclusion in the face of the very thorough study of Professor Merrill marshalling facts which point to a contrary conclusion.[7] As to "additional administrative costs," "delay" and the alleged deterrence of warranted discharges, Merrill points out that "The data * * * show that in 1970 agencies that provided hearings in advance generally processed cases faster than those that made a hearing available only on appeal." He adds that "available data clearly do *not* show that conducting the hearing afterwards helps shorten the process."

The contention that the retention of an unsatisfactory employee pending a hearing might be disruptive loses most of its force when it is revealed that the law and regulations existing at the time *Arnett* was decided required that an employee be given at least thirty days' notice of a proposed adverse action so that, as pointed out by Merrill, "agency personnel even now must function for at least a month with the threatened employee in their midst."[8] There is no reason to assume that a hearing could not be scheduled and held within that thirty-day period.[9] There are other data and factors which could be recited to prove that it is not necessary in the interest of office efficiency to postpone the termination hearing.[10] In fact, a pre-termination hearing should *enhance* efficiency by giving the agency an incentive to expedite disposition

[7]The substance of the report is contained in an article entitled *Procedures for Adverse Actions Against Federal Employees, supra* note 6. On the basis of Merrill's report, the Administrative Conference of the United States strongly recommended that evidentiary hearings be held prior to discharge.

[8]Merrill, *supra* 59 Va L Rev at 241.

[9]"[T]here seems little reason why a hearing could not be held during that 30-day period." Marshall, J., dissenting, 416 US at 225.

[10]*E.g., see* Marshall, J.'s dissent in *Arnett;* Merrill, *supra* 59 Va L Rev 196 at 238-246; *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees,* 10 Harv Civil Rights L Rev 472 (1975).

of the matter, allowing it to get on with its primary functions.[11]

The conclusion is, then, that the government as employer has no interests which outweigh those of the employee calling for the postponement of the hearing until after termination has been effected. There being no identifiable governmental interests deserving special protection, the hearing requirements necessary to satisfy due process are the same in preserving the interests of an employee whose job is threatened as they are where an owner's property is sought to be taken or where a person's liberty is at stake.[12]

I am satisfied that due process requires a prior hearing before *property* can be taken.[13] On the same facts, I would regard Art. I, § 10 as requiring the same pre-taking procedure. Since I regard an entitlement as a species of property within the meaning of Art. I, § 10, an employee having such an interest is entitled to have a hearing before that interest is taken from him.

[11]*See,* 59 Va L Rev at 245.

[12]Cf., *Fuentes v. Shevin,* 407 US 67, 92 S Ct 1983, 32 L Ed2d 556 (1972), where it was held that due process requires a prior hearing before property can be taken through the use of state law replevin procedures to repossess chattels; and *Morrissey v. Brewer,* 408 US 471, 92 S Ct 2593, 33 L Ed2d 484 (1972), where it was held that due process requires a prior hearing before a person can be deprived of liberty through state parole revocation.

[13]*See, Fuentes v. Shevin,* 407 US 67, *supra* note 12; *Sniadach v. Family Finance Corp.,* 395 US 337, 89 S Ct 1820, 23 L Ed2d 349 (1969).

Appendix I

No. 514—December 29, 1975

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HAMMER, *Petitioner. v.* OREGON STATE PENITENTIARY ET AL (CA 4900), *Respondents.*

Judicial Review from Public Employe Relations Board.

Argued and submitted November 25, 1975.

Henry H. Drummonds, Eugene, argued the cause for petitioner. With him on the brief were Kulongoski, Heid, Durham & Drummonds, Eugene.

Al J. Laue, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before SCHWAB, Chief Judge, and LANGTRY and FORT, Judges.

AFFIRMED.

FORT, J.

Petitioner was suspended and dismissed from his position as corrections officer at the Oregon State Penitentiary for chronic and excessive absenteeism on the ground that such conduct constituted "unfitness to render effective service" under ORS 240.555(1). Petitioner appeals from an order of the Public Employe Relations Board (PERB) affirming his dismissal. He was a classified employe under the State Merit System Law, ORS ch 240.

Petitioner claims error because no showing was made that he was unfit to work at the time of his discharge and because the hearing granted him was insufficient to meet the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The evidence at the hearing was that at the time petitioner was hired at the Oregon State Penitentiary in January 1972 he had a sciatic nerve injury from active service in Vietnam. In October 1973 petitioner injured his back while on the job. He also suffered from hypertension.

As a result of his back injury and other health problems petitioner was frequently absent from work in 1973 and 1974. PERB found that while absences due to the on-the-job injury were not cognizable in a discharge proceeding, petitioner was absent 143 3/4 hours in 1973 and 169 hours in 1974 in addition to all his regular sick leave and to time loss caused by his back injury.

PERB also found that absenteeism created a serious problem at the penitentiary. Security positions of necessity had to be filled. Absence on short notice required working officers overtime and disrupting their schedules until a relief person could be located. This created a hardship since a number of corrections officers had been absent frequently. Petitioner's record was worse than that of any of the other security officers.

Penitentiary personnel had notified petitioner both orally and in writing several times that his absence record was a serious problem and that he might be disciplined or discharged if his performance did not improve. He was notified at least five times during 1974 that his attendance record was unsatisfactory, the last time on October 21, 1974. After that date petitioner was absent five days in October and November. On December 3, 1974, petitioner was suspended for ten days without pay and then discharged.

After a hearing held January 22 and 23, 1975, a

report from its hearing examiner, and oral argument, PERB, on June 6, 1975, upheld the dismissal.

The first question before us is whether PERB had evidence before it to conclude that absences averaging over 19 days per year in addition to authorized sick leave here constitute unfitness to render effective service under ORS 240.555(1).

Petitioner claims that after November 4, 1974, his back problem and hypertension were in remission and that he could not be discharged without a medical examination to establish that he was unable to work. At the hearing he produced a cryptic note from his doctor stating that he thought petitioner was medically able to work, but nothing more.

We believe that PERB's findings of fact are supported by substantial evidence in the record.

Petitioner was hired as a full-time employe. His health problems other than those related to his on-the-job injury have had the effect of making him a part-time employe with unpredictable periods of absence. This has resulted in disruption in the manning of security posts at the penitentiary and, upon occasion, hardship on his fellow workers as stated above. The Board found that petitioner was not wilfully absent for reasons other than health. Nonetheless, after considering his two-year history of numerous absences for health reasons we conclude that this record is sufficient to find that he is unfit to render effective service on his responsible job. The employer is not required to obtain a medical examination of its employe.[1]

[1] For other discharges applying the "unfitness to render effective service" clause along with other clauses of ORS 240.-155(1), *see* James v. Employment Division, 75 Adv Sh 490, 20 Or App 309, 531 P2d 710, Sup Ct *review denied* (1975); Joiner v. Public Emp. Relations Bd., 14 Or App 567, 513 P2d 523, Sup Ct *review denied* (1973); Phillips v. State Bd. of Higher Ed., 7 Or App 588, 490 P2d 1005 (1971), Sup Ct *review denied* (1972).

We find that "unfitness to render effective service" is not unconstitutionally vague as petitioner contends. In *Arnett v. Kennedy*, 416 US 134, 158, 94 S Ct 1633, 40 L Ed 2d 15 (1974), the plurality held that the provision of 5 USC § 7501(a) authorizing removal "for such cause as will promote the efficiency of the service" was not unconstitutionally vague. This court has also held in *Palen v. State Bd. of Higher Education*, 99 Adv Sh 1254, 18 Or App 442, 525 P2d 1047, Sup Ct *review denied* (1974).

Petitioner next challenges the sufficiency of the procedures followed in his discharge, contending that the lack of a full evidentiary hearing *before* discharge violated his due process rights. He also contends that the hearing before the PERB hearings examiner was not a de novo review of the decision to discharge and thus was not sufficient for due process.

We have recently dealt with these issues in *Tupper v. Fairview Hospital*, 75 Adv Sh 3218, 22 Or App ——, 540 P2d 401 (1975), where we held that an employe was constitutionally entitled to a pretermination evidentiary hearing. We also held there that the hearing before a PERB examiner was sufficient to meet due process requirements except that it came too late. We apply that rule here. *See also: Gunsolley v. Bushby*, 99 Adv Sh 3229, 19 Or App 884, 529 P2d 950 (1974).

Affirmed.

Appendix J

CORRECTIONS DIVISION
OREGON STATE PENITENTIARY
DEPARTMENT OF HUMAN RESOURCES
2605 State Street—Salem, Oregon—97310—
Phone 378-2445

December 3, 1974

Mr. Jerry L. Hammer
239 Eldine Street
Salem, Oregon 97301

Dear Mr. Hammer:

Being employed in the Security Section of the Oregon State Penitentiary in the classification of Correctional Officer, you are hereby notified of the following personnel actions:

CLASSIFICATION:	Correctional Officer
PAY RATE:	$715 per month
SECTION:	Security Section, Oregon State Penitentiary.
PERSONNEL ACTIONS:	Suspension from duty without pay for a period of ten (10) work days from Tuesday, December 3, 1974 through Monday, December 16, 1974, including the beginning and ending dates, to be followed by your dismissal from employment as a Correctional Officer at the Oregon State Penitentiary on Tuesday, December 17, 1974.
STATUTORY GROUNDS FOR THE ACTION:	Other unfitness to render effective service as provided by ORS 240.555.
CHARGES AND FACTS SUPPORTIVE OF ACTION:	Records indicate that you were appointed January 17, 1972, as a Correctional Officer. Your attendance record for 1972 indicated a total of 76 hours paid sick leave and 44-½ hours sick leave without pay.

CHARGES AND FACTS SUPPORTIVE OF ACTION (continued):

Attendance records for 1973 indicate a total of 91 hours paid sick leave and 305 hours sick leave without pay.

Attendance records from January 1, 1974, through November 30, 1974, include a total of 67 hours paid sick leave and 335 hours sick leave without pay and other leave without pay.

You have been counseled many times about your continuing absence problems.

On January 14, 1974, you receive a written reprimand in which it was pointed out to you that: "Your employment is not 'part-time' but rather is a full-time position, and your absence whenever and wherever it occurs and for whatever reason hinders the efficient operation of this penitentiary." Further, this written reprimand stated that: "If your absences have been truly due to physical disability, we recommend that you apply for an extended leave of absence without pay in order that you might have sufficient time to get your health in shape to truly to be able to resume full-time duties upon your return."

You did not take advantage of this offer of an extended leave and your absences have continued at an ever-growing rate. You were further told that: "If you decide not to request an extended leave of absence for health reasons, we must assume that your physical condition will allow you to undertake full-time duties; and in the event that your absence record continues in the future as it has in the past, you will be subject to further disciplinary action up to and including discharge."

On September 30, 1974, your Report of Performance Appraisal rated you as a "C" and you were denied a merit salary increase at that time on the basis that: ". . . Mr. Hammer could be a good officer but he appears to have little if any interest in his job. Mr.

Hammer has been counseled several times about the use of sick leave."

On October 23, 1974, you were again counseled by Messrs. Pribble and Keeney about your continued unsatisfactory use of sick leave time.

Your absences during the nearly three years of your employment total 926.5 hours or about 23 weeks or over seven weeks per year. Since January 1, 1974, your absences have been at the rate of more than eight weeks a year. Since the October 23, counseling, you have been absent a total of 40 hours, specifically on October 27, November 4, 24, 25 and 26.

Your undaunted and increasing absences since the January 14, 1974, written reprimand, the performance appraisal of September 30, 1974, and the counseling of October 23, 1974, viewed against the background of your total absence record, give us no choice but to conclude that you are unfit to render effective service.

You have been given every consideration in your employment at this institution; and there are no mitigating circumstances in your case that would cause us to reduce the ten work day suspension and dismissal here ordered.

Please be advised that ORS 240.560 and Personnel Division Rule 81 100 grant you the right to appeal this

Personnel Action to the Public Employe Relations Board within ten days of the effective date of this action. You may wish, if you so choose, to contact the AFSCME Local 2623 for assistance in such appeal.

Very truly yours,
H. C. CUPP,
Superintentent

HCC:nn

APPROVED

R. J. WATSON, Deputy Administrator
for AMOS E. REED, Administrator

cc: Personnel Division
Public Employe Relations Board
Mr. Don Gertenrich, President, AFSCME Local 2623
Mr. W. Hoelscher, Department of Justice
Mr. Phil Senkovich, Chief Personnel Officer, Corrections Division
Personnel File

Supreme Court, U. S.
FILED
FEB 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION,
DEPARTMENT OF HUMAN RESOURCES;
PUBLIC EMPLOYE RELATIONS BOARD,
Petitioners,

v.

JERRY HAMMER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

---

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY H. DRUMMONDS
Kulongoski, Heid, Durham
& Drummonds
1209 Pearl Street
Eugene, Oregon 97401

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-925

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION, DEPARTMENT OF HUMAN RESOURCES; PUBLIC EMPLOYE RELATIONS BOARD,
Petitioners,

v.

JERRY HAMMER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

We agree that the Petition for Certiorari was timely filed, so that this Court's jurisdiction over the Petition is properly invoked under 28 U.S.C. § 1257(3). However, while petitioners show, pursuant to Rule 23(1)(f) of this Court, that the first question presented by the Petition involves a federal question which was properly raised below, no such showing is made with respect to the second question presented, relating to remedy. As we develop at pp. 10-13, *infra*, this Court lacks jurisdiction to review the ruling challenged by the second question because the Oregon Supreme Court's choice of remedy rested independently and adequately (and perhaps even exclusively) on State law.

QUESTIONS PRESENTED

1. Did the court below properly apply the constitutional standards declared by this Court in evaluating the procedures by which respondent's employment was terminated?

2(a). Does the State Court's determination that respondent is entitled to back pay until he is properly terminated rest on an independent and adequate State ground?

(b). If not, was that determination erroneous as a matter of federal law?

STATEMENT

1. Respondent accepts the State's statement of the facts underlying respondent Hammer's discharge as quoted from the opinion of the Supreme Court of Oregon (Pet. 7-8).[1]

2. It is necessary, however, to dispel what the State refers to as "confusion as to the scope of review exercised by PERB [Public Employe Relations Board] in reversing Mr. Hammer's dismissal". (Pet. 6, n.2). At the time that it decided Hammer's case, the PERB did not make a *de novo* determination of the propriety of an employee's discharge. Rather, the proceeding before the Board was treated as an appeal from the employer's decision, the employee being denominated "Appellant".

The rule was stated as follows by the Oregon Court of Appeals:

> In order to modify or reverse an agency order dismissing or suspending an employe, the Board must—in those cases where 'good faith' is not an issue—find that the action is arbitrary either because the employer has failed to establish facts to support the charges upon which the action is based or because though the charges are supported they constitute no 'cause' upon which a reasonable employer would base the action taken.[2]

[1] Petitioners will sometimes be referred to collectively herein as the "State"; "Pet." refers to the Petition for a Writ of Certiorari.

[2] *Thompson* v. *Secretary of State*, 19 Or.App. 74, 80, 526 P.2d 621, 624, Ore. Sup. Ct. review denied (1974), followed in *Tupper* v. *Fairview Hospital*, 22 Ore. App. 523, 540 P.2d 401, 407, modified on other issues, 276 Ore. 657, 556 P.2d 1240.

This limited scope of review of the employer's decision underlies the PERB's approval of respondent's discharge although it determined after the hearing that less than half of the hours of unpaid sick leave on which the employer based the discharge were properly the subject of disciplinary action.[3] It is also significant in assessing the surmise that the infirmity in the pre-termination procedure could not have affected the proceedings against Hammer (Pet. 14-15). The *Thompson* rule was reaffirmed on this point by the Court of Appeals in the *Stanton* case referred to at Pet. 6, n.2,[4] and was approved by the Oregon Supreme Court in *Civil Rights Division of Bureau of Labor* v. *Williams*, 280 Ore. 595, 573 P.2d 270 (1977).[5]

[3] The Board determined that of the 1973 unpaid sick leave on which the charge relied, almost half was due to an industrial accident and therefore "not cognizable in any disciplinary action," and a large portion of the 1974 unpaid sick leave had actually been authorized by the employer. Findings 1 and 2, p. 2 of Public Employe Relations Board for the State of Oregon, No. 309, Rulings on Motions and Evidentiary Matters, Findings of Fact, Conclusions of Law, and Order (hereafter "PERB Decision"). The Board also made the following "Finding of Ultimate Fact" with respect to Hammer's absence:

> "Appellant in 1973 and 1974, in addition to exhausting normal sick leave (12 days a year) and vacation credit (10 days and 11 days respectively) was absent on an unauthorized leave without pay basis a total of 143¾ hours in 1973, and 169 hours in 1974. Sixteen days, or 128 hours, was taken in 1973, resulting from an industrial accident, in addition to the 143¾ hours leave without pay taken. In 1974 Appellant was given permission to take 10 days on a leave without pay basis, in addition to the 160 hours taken on an unauthorized leave without pay basis." (*Id.*, p. 3.)

The 143¾ hours in 1973 and 169 hours in 1974 on which the Board based its decision contrasts with 305 hours in 1973 and 335 hours in 1974 on which the employer based its action, see Pet. 61.

The PERB concluded: "This action is found to have been taken in good faith and for cause. A reasonable employer, with posts that must be filled, would not be expected to retain an employee who consistently had this much absence from work" (PERB Decision, p. 4).

[4] *Stanton* overruled *Thompson* on an entirely distinct issue, not involved here, namely, the scope of the PERB's fact-finding authority.

[5] The Supreme Court of Oregon said in *Williams*, 573 P.2d at 271-272) (emphasis supplied):

3. Finally, it is necessary to describe somewhat more fully the Supreme Court of Oregon's reasoning in *Tupper* v. *Fairview Hospital*, 276 Ore. 657, 556 P.2d 1340 (1976), (reproduced as Appendix H to the Petition, pp. 42-55). *Tupper* was decided together with, and followed in, the Supreme Court of Oregon's initial decision of this case (*Hammer I*, Pet. 35-38), which was reaffirmed in the decision of which review is now sought (*Hammer II*, Pet. 23-30). While the Supreme Court was unanimous in deciding that the pre-termination procedures were unconstitutional, one Justice concluded, without reaching the Fourteenth Amendment issue, that the pre-termination procedures violated Art. I, § 10 of the Oregon constitution. See Pet. 50-55 (*Tupper*), followed at Pet. 30 (*Hammer I*). In response, the majority explained in *Tupper* that it determined initially that the procedures were unlawful under the Fourteenth Amendment, and only derivatively, because the due process requirements of both provisions were "essentially the same," that Art. I, § 10 was also violated. (Pet. 48, n.2).[6] With respect to remedy, the court wrote in *Tupper* (Pet. 49):

> Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974,

The Court of Appeals has, in a number of cases, construed these statutes to provide that where there is cause for discipline ERB *may only modify* disciplinary action taken by the agency *if it*, ERB, *finds that no reasonable employer would have regarded the facts as presenting sufficient cause for the disciplinary action taken.* (Citing *inter alia, Stanton and Thompson.*)

[6] The court reasoned (*id.*):

> The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett*, does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the "due course of law" provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pretermination hearing in such cases. This issue was never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state "due course of law" constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art. 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. [Citing a series of Oregon decisions.]

> was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

[5] The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 193.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds "[t]he statute, rule or order to be unconstitutional." ORS 183.482(8)(b).

Hammer I followed *Tupper* on this point without additional comment, see Pet. 38. *Hammer II* added nothing further on the remedial issue.

REASONS FOR DENYING THE WRIT

I. The Petition Accepts The State Court's Formulation Of The Governing Legal Standards; Its Disagreement With The Court's Application Of Those Standards Is Without General Importance And Lacks Merit.

A. In considering petitioner's claim of inconsistency between the decision below and the "reasoning of this

Court", (Pet. 10)[7] it is essential to bear in mind that the holding below is very narrow:

> We emphasize again that we do not hold that due process requires an evidentiary hearing prior to employment termination in cases such as this. We merely hold that Hammer was entitled to notice of the charges against him, the kind of sanctions being considered, and an opportunity to respond to the charges prior to his dismissal. In our view, such a requirement will impose a minimal burden on the state. (Pet. 29-30)

Thus, this case differs from each of those on which petitioner relies, wherein the issue was "the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter", *Dixon* v. *Love*, 431 U.S. 105, 112, quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 333. Indeed, the procedural rights required by the decision below are no greater than those which had actually been afforded in *Mathews*, 424 U.S. at 323-324, 337-338, and in the only employment case on which petitioner relies, see *Arnett* v. *Kennedy*, 416 U.S. 134, 137, 140-144 (opinion of Rehnquist, J.), 170 (opinion of Powell, J.). In *Dixon*, the facts which *automatically* called for deprivation of the property right (suspension of a driver's license) had already been established at full evidentiary hearings, see 431 U.S. at 113; and in *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, the decision to dismiss a student for *academic* grounds was deemed "not readily adapted to the procedural tools of judicial or administrative decision-making", (*id.* at 90), contrasting *disciplinary* determinations for which *Goss* v. *Lopez*, 419 U.S. 565, requires a hearing far more elaborate than that contemplated by the decision below.

[7] We note that the State does not contend that the decision below is contrary to anything which has actually been *decided* by this Court.

B. The State does not deny that respondent, who was subject to dismissal only "for cause" enjoyed a constitutionally protected "property" interest in his continued employment. See Pet. 4. Nor does the State contend that the court below applied the wrong legal standard. No such contention would be tenable, since the three-step analysis of *Mathews*, 424 U.S. at 335 (which was reaffirmed in *Dixon*, 431 U.S. at 112-113[8] and which the State recognizes is proper, see Pet. 11[9]) was followed in its *Tupper* opinion, see Pet. 46-47, and again on remand herein, see Pet. 26-29. The court thereby faithfully complied with the direction (434 U.S. 945) to reconsider its original decision herein in light of *Dixon*.

In short, the State's sole claim is that the Oregon Supreme Court erred in applying the agreed-upon legal standard to respondent's discharge. While this Court undoubtedly has jurisdiction to review a state court's application of federal standards, the occasions for the exercise of that authority must be rare indeed. This Court having delineated the controlling factors, the task of evaluating particular state employee discharge procedures according to those factors must perforce be left to the state courts and the lower federal courts. The State does not even assert that its claim that the Oregon Court erred in applying these criteria is especially significant or otherwise more worthy of review than a like claim which might be brought by the losing party—be it a public employer or a public employee—in any of the countless cases which will inevitably be generated by the seminal decisions in *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593. In thus

[8] Accordingly, the issue which divided this Court in *Bishop* v. *Wood*, 426 U.S. 341, is not presented.

[9] See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 16-18, where the balancing approach of *Mathews* resulted in the conclusion that a public utility's administrative procedure for entertaining customer complaints concerning termination was constitutionally inadequate.

resting on its claim of error on this record, the State ignores the admonition that this Court's exercise of its certiorari jurisdiction, "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review" (*Ross* v. *Moffitt*, 417 U.S. 600, 617). In any event, the claim is not well taken.

C. With respect to the private interest affected by the decision, the Court below said:

> On a continuum, placing a driver's license and other "privileges" at one end and welfare payments and other "necessities" at the other end, employment semes to us to be closer to the "necessity" end of the continuum. (Pet. 27)

This view is entirely sound, and consistent with *Arnett*, Pet. 11, where neither of the opinions for the majority suggested, and the Court plainly did not hold, that the employee's interest in continued employment is unworthy of even limited procedural protection. The State simply cites *Arnett*, although as noted, the Court there decided only that the employee was not entitled to a pretermination evidentiary hearing.

The State contends that the "risk of erroneous deprivation through the procedures used in this case is minimal" (Pet. 12). But it is plain from the decision of the Public Employe Relations Board that the propriety of the discharge involved much more than an interpretation of attendance records and that the risk of error was quite substantial.[10] The State's claim that its procedures are reliable is discredited by the PERB's ultimate finding that Hammer could lawfully be charged with less than half of the hours of unpaid sick leave on which the employer relied in discharging him. See text and note at p. 3, n.3, *supra*. And, as the court below said, contrasting *Dixon* v. *Love*:

[10] Seven witnesses appeared at the hearing and the transcript runs 296 pages.

> * * * the decision in the present case was not automatic. Instead, it was necessary to consider a variety of factors, including the reasons for Hammer's absenteeism, the Penitentiary's ability to accommodate his absences, and the possibility that the absenteeism might be eliminated in the future. Particularly with respect to the third factor, we believe that Hammer should have been afforded an informal opportunity to respond to the charges prior to his dismissal. (Pet. 28)[11]

Lastly, the State asserts that "the Oregon Supreme Court determined there was no 'substantial public interest' in Mr. Hammer's termination" (Pet. 13). But what the court below actually determined was (Pet. 29, emphasis supplied):

> Finally, there was no "substantial public interest" *in the summary termination of Hammer's employment* comparable to the public interest in highway safety that compelled the summary license revocation in *Dixon*. Hammer's performance as a corrections officer was not under attack, only his absenteeism. To allow him an informal opportunity to respond to the charges against him prior to his termination would have posed no substantial threat to prison security.

This reasoning, too, is entirely consistent with *Arnett*, (Pet. 13) which, as we have stressed, dealt with "a requirement of a prior evidentiary hearing" (416 U.S. at 168, opinion of Powell, J.).

[11] Petitioner presented evidence at the PERB hearing, and could have shown to his employer, that his injuries were in remission at the time of his discharge and thus not a valid basis for assuming he would be as absent in the future. (PERB Tr. 226, 240, 261-262). Particularly since those injuries were in part incurred in the Vietnam war, and in part in the course of his employment, the employer might have considered discharge to be too drastic a course. But the PERB was without authority to reverse his discharge unless it could find that a reasonable employer could not have imposed that sanction. See *Thompson*, p. 2 at n.2, *supra*, and *Williams*, pp. 3-4, n.5, *supra*.

In sum, there is no merit in the Petition's contention that the Supreme Court of Oregon erred in applying the standards laid down by this Court; more significantly, the contention lacks sufficient general importance to justify this Court's attention.

II. The Remedy Provided By The State Court Rests On An Independent And Adequate State Ground; The State's Objection To The Remedy Is Without General Importance And Lacks Merit.

A. The second question presented by the Petition is: "Under such circumstances [which the question partially misstates, see p. 13, *infra*], does the Fourteenth Amendment require that the employee be considered still employed and entitled to an award of back wages?" (Pet. 3-4). However, the Court below did not, in either of its *Hammer* opinions, nor in *Tupper*, state that the remedy which it provided was required by the Fourteenth Amendment; the Court's actual reasoning on this point, quoted at pp. 4-5, *supra*, says nothing about the federal Constitution. Nor does the State make any showing in the portion of the Petition entitled "Manner in Which Federal Question was Raised" (Pet. 8) or elsewhere, that the remedial issue was decided by the court below on federal grounds or otherwise involves a federal question which had been properly raised.[12] This omission, which contrasts with the State's properly comprehensive description of

[12] All that the Petition says is "The court found that because of the violation of the Fourteenth Amednment, Mr. Hammer was still employed and entitled to back wages until the time he was properly terminated." Pet. 14. This statement may usefully be contrasted with what the State asserted in its prior Petition for certiorari (No. 76-1377, at p. 13): "As a result of its finding of a violation of procedural due process, the Oregon Supreme Court held that the Fourteenth Amendment dictates that Mr. Hammer is still employed and entitled to an award of back wages for the entire time involved." Unlike its antecedent, the current version is accurate; but it is well short of the requisite assertion that the court below held that an award of back pay is required by the Fourteenth Amendment.

how the first question was raised,[13] is itself decisive if the purpose of Rule 23(1)(f) is to be respected. The State's obligation to establish jurisdiction is all the clearer since it was put on notice of our position that "the Oregon Supreme Court's decision on remedy rests on an independent and adequate State ground and is therefore not reviewable here". See Respondent's brief in opposition to certiorari (inadvertently untitled) in No. 76-1377, p. 8. We reiterate this submission here. See, *e.g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 564; *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 491-492.

As already noted, there is no indication in the Supreme Court of Oregon's opinions in *Tupper* or *Hammer* that its selection of the remedy was based on the perceived compulsions of *federal* law.[14] On the contrary, in discussing this issue, the Court corrected, *on the basis of Oregon statutes*, the Oregon Court of Appeals' view that the Public Employe Relations Board lacked authority to award back wages. See Pet. 49, n.5, quoted at p. 5, *supra*. The Oregon statutes there referred to authorize the reviewing court to reverse or remand the agency's action if it finds the "statute, rule or order" to be "unconstitutional," without specifying that only violations of the federal constitution can be corrected; plainly, violations of the state constitution which are likewise of a higher legal order are also included. Moreover, prior Oregon decisions had provided for reinstatement with full back pay for violations of employee rights, be their source

[13] While the pre-termination procedures were found to violate both the federal and state constitutions (see p. 4, and n.6, *supra*), the majority opinion below makes clear that with respect to that issue the Oregon court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568.

[14] Given the Court's scrupulous care to articulate the basis of its holding on the termination issue (thereby obviating any jurisdictional obstacles to review thereof), the inference that it was making an independent judgment on the remedy issue is compelling.

contractual, statutory, or constitutional. *Papadopoulos* v. *Oregon State Bd. of Higher Ed.*, 14 Or.App. 130, 511 P.2d 854, 876, Ore. Sup.Ct. *review denied* (1973) *cert. denied*, 417 U.S. 919, citing *Greene* v. *Howard University*, 134 U.S.App.D.C. 81, 412 F.2d 1128 (breach-of-contract case).[15]

It follows that the state court's award of back pay rests entirely on an independent state ground. And that ground is *adequate*, unless it violates the federal Constitution for a state to provide a more generous remedy than the federal Constitution requires for a violation of an employee's Fourteenth Amendment rights. And, while we believe that any contention that the federal Constitution is violated by such unnecessary generosity would be insubstantial, the important point, for jurisdictional purposes, is that the State makes no such contention in the Petition for Certiorari and, despite two opportunities, did not assert before the Supreme Court of Oregon that the remedy which it directed violates the federal Constitution. For these reasons, it is clear that the remedial issue is not properly before this Court.

There is an additional jurisdictional infirmity in the State's effort to obtain review of the remedial issue. As we have seen, once the court below had decided that the procedures whereby respondent was discharged violated the Fourteenth Amendment, it also concluded, because "the procedural effect of state 'due course of law' constitutional provisions *is essentially the same* as the procedural effect of the due process clause of the fourteenth amendment," that Article I, § 10 of the Oregon statute is also violated (Pet. 48, n.2, emphasis added). *Thus, the State Court's order remedied a violation of both the state and federal constitutions.* And of course, the appropriate remedy for a violation of state-created rights does not raise any federal question. If it could be said that the State Court's decision was based on federal

[15] In *Greene* the court expressly disavowed deciding any constitutional issue. See 134 U.S.App.D.C. at 84, 412 F.2d at 1131.

grounds insofar as it remedied a violation of the Fourteenth Amendment, it certainly rested exclusively on State grounds insofar as it remedied the violation of the State constitution. For this reason too, this Court is without jurisdiction to review that portion of the State Court's decision to which the second Question Presented by the Petition is addressed.

B. Even if, contrary to the foregoing, this Court has jurisdiction to review the propriety of the remedy, certiorari should not be granted to consider that issue, for the Petition does not even suggest that this is an issue of general importance; it asserts only that the decision below was wrong, as if that were a sufficient reason for granting certiorari. And here again, the State's criticism of the decision below is wide of the mark.

The claim of error rests entirely on the proposition that "the Oregon court failed to find that the post-termination hearing cured any procedural errors which occurred in the pretermination procedure" (Pet. 15). The Supreme Court of Oregon was entirely justified in failing to so find because it is clear as a matter of law that the constitutional inadequacy of the pre-termination procedures was not "cured" by the PERB's decision after hearing: The PERB did *not*, as asserted in the State's description of the question presented, find "that the employer had sufficient reason under the law to dismiss the employe" (Pet. 3). Rather, in accord with its limited review function under Oregon law, see p. 2, *supra*, the PERB determined only that Hammer's absences constituted cause for which a reasonable employer would discharge an employee. See p. 3, *supra*.

An argument identical to that of the State was met and rejected under parallel circumstances in *Armstrong* v. *Manzo*, 380 U.S. 545. There, a Texas trial court, without notice to the natural father, had entered an adoption decree depriving him of his parental rights. The Texas Court of Civil Appeals held "that whatever constitutional

infirmity resulted from the failure to give the [father] notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree" (see *id.* at 551). This Court disagreed because in the subsequent hearing the father was faced with a more substantial burden than would have been imposed on him if the constitutionally mandated procedures had been followed from the beginning. Mr. Justice Stewart wrote for a unanimous Court (*id.* at 552):

> A fundamental requirement of due process is "the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

See also *Goss* v. *Lopez*, 419 U.S. 565, 581-582, n.10.

In the present case, respondent never had the opportunity to point out to his employer, or to anyone else who possessed independent authority to determine whether he should be discharged, that a substantial part of the absenteeism with which he was charged could not properly be considered as a basis for dismissal, see p. 3, *supra*, and to urge, for instance, that since his performance at work had been entirely satisfactory, that he should be retained. Therefore, the PERB's decision *could not* "wipe[] the slate clean." The only adequate and equitable remedy for the violation is therefore to treat the entire proceedings against respondent as a nullity, and to hold that he is entitled to receive wages and other employee benefits unless and until he is discharged in accordance with the constitutionally mandated pre-termination procedures. That is the remedy provided by the court below. If the State's challenge to that remedy

is within this Court's jurisdiction, it is not of sufficient merit to warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HENRY H. DRUMMONDS
Kulongoski, Heid, Durham
& Drummonds
1209 Pearl Street
Eugene, Oregon 97401

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for Respondent